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No. 97-164

IN THE SUPREME COURT
OF THE UNITED STATES

LINDA K. HANSEN,

Petitioner,

-vs-

SEA RAY BOATS, INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
IN AND FOR THE TENTH CIRCUIT**

REPLY PETITION FOR A WRIT OF CERTIORARI

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19 pp

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STATEMENT OF THE CASE

Respondent suggests that this is a *"garden variety"* personal injury action arising under State law. To the contrary, this case involved complex issues which the lower court found necessary to seek divine intervention from the State's highest Court. The issue presented concerned a legal interpretation of state law at first glance. The Respondent attempts to gain empathy by suggesting that the Petitioner has "misrepresented" how the case came before the District Court and the Utah Supreme Court on Certification. Nothing could be further from the truth.

Petitioner would first point out that the other personal injury plaintiffs were not "swimming" as suggested by Respondent, but rather were electrified simply by jumping in behind the boat. Only one of the plaintiffs [Mrs. Hansen's son] had any initial desire to swim on that early morning. The remaining three plaintiffs were rescuers. This was by no stretch of the imagination a social swimming event as pictured by the Respondent.

The issues raised on this Petition focus, not upon the type of case, but based upon an abuse of the application of a general rule of procedure concerning motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In that respect, application of a Federal Rule requires application of Federal standards under Federal case law, not State law. To that end, Petitioner asserts that there is no precedence from this, or any other court, whether arguments and suggestions of counsel rise to the level of satisfying a movant's burden when seeking a ruling on summary judgment.

Petitioner has continually over the history of this case requested the Respondent to simply point out what portions of the record it relied upon to convince the lower court that no genuine issues of material fact existed as to the Petitioner's underlying claims. To this day, Respondent fails to address this contention as demonstrated below.

A. RESPONDENT'S "EVIDENCE" IN SUPPORT OF [DEFENDANTS'] MOTION FOR SUMMARY JUDGMENT.

The basis for the Respondent's motion for summary judgment lay in its submission that *"[s]ince by her own admission Mrs. Hansen did not attempt a rescue, she was not (according to defendants) subject to an unreasonable risk of bodily harm."* [Respondent's Appendix, I, 2, 4] The argument posed by the defendants at that time was singularly premised upon Mrs. Hansen's deposition statement that:

> Q. I take it that you were never shocked, is that right?
> A. No. I was not in the water.
> Q. And I take it –
> MR. DUNN: And you were not shocked?
> THE WITNESS: No. I was not shocked.
> Q. (BY MR. WINEGAR) I take it that you never were in fear of being shocked?
> A. No.

That is the only portion of Mrs. Hansen's deposition that was relied upon by the defendants at the time they moved for summary judgment.[1] The deposition questions do not address whether Mrs. Hansen was physically threatened by an electrical shock, but only that she had no fear of being shocked since she did not enter the water or contact those who were in the water. The defendants, and

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[1] It is claimed that the entire transcript of Mrs. Hansen's deposition was not included in the record on review, or now. The lower court never had the benefit of considering the deposition of Mrs. Hansen. The defendants only quoted from it without submitting it as part of the motion for summary judgment.

eventually the lower court and appellate court, apparently drew a different interpretation and meaning from that selected portion of the deposition statement. Therein lies the foundation for this Petition, whereby the arguments of counsel supplemented the record with argumentative inferences in order for the deposition statement to appear as if Mrs. Hansen had never been threatened by electricity; a statement that does not appear in the deposition statement.

Respondent fails to address Petitioner's opening argument that the issue of "fear" had, in fact, been resolved in favor of the Petitioner. This point is apparently conceded now by the Respondent. The only point of contention, therefore, is whether the "evidence" presented to the lower court, and that of the Court of Appeals, was sufficient for the court(s) to rule, as a matter of law, that Mrs. Hansen was never threatened by the electrical current.

The analysis of the Respondent assumes that the two prong test for the "zone of danger" rule in Utah as applied to this case comprises of a singular fact; that a person's "fear" is synonymous with a person being "threatened" by a source of harm. The two elements are not interchangeable, but distinct and separate issues to be resolved. See Johnson v. Rogers, 763 P.2d 771 (Utah 1988). Each of the selected portions of Petitioner's affidavit relate to the issue of "fear," not the issue of being "threatened." Respondent has failed to point to any part of the record wherein the "*pleadings, depositions, interrogatories, or affidavits*" treat the issue of "threatened."

B. THERE WAS NO EVIDENCE TO DETERMINE WHETHER MRS. HANSEN WAS THREATENED WITH PHYSICAL HARM.

Respondent relies solely upon the "Order of Certification" submission for its basis to argue that the "District Court did in fact

determine that Mrs. Hansen was not threatened with bodily harm." Respondent's Opposition to Petition, pg 5. ["Res.Opp"]. The focus of this Petition is not upon the statements within the "Order of Certification," but whether mere arguments of counsel are a sufficient basis to support a motion for summary judgment.

The logical error in Respondent's reliance upon the language in the Order of Certification as conclusive proof of the lower court's ruling on the threat issue is that the lower court's determination that Mrs. Hansen was not threatened with bodily harm was based upon speculation that the boat was a place of safety. To say that the lower court had already determined that Mrs. Hansen was not threatened with bodily harm based upon the "evidence" before it, is adding insult to injury. This point was also made by the Court of Appeals. The emphasis in this matter has always been placed upon the cart, rather than the proverbial horse. The lower court's penning of the Order of Certification was derived from false and inappropriate arguments of counsel, nothing more.[2]

The challenged error is that there has been no review of any evidence, but only the remarks of counsel and the court have been considered as a basis for affirming the grant of summary judgment against the Petitioner. Not once has a reviewing court placed any emphasis on or even identified any part of the record evidence upon which to base its opinions adverse to the Petitioner.

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[2] Respondent's argument concerning "a number of hearings" on the form of the Order of Certification is misleading. The lower court, according to Respondent, had already made a factual determination that Mrs. Hansen failed to satisfy the second prong of the zone of danger test; actually threatened with bodily harm. The lower court's determination of that fact is at issue here and the foundation for such is challenged, not what the Order of Certification stated. Res.Opp., pg 3.

As pointed out in her opening Petition, the defendants offered nothing by way of "pleading, deposition, interrogatories, admissions, or affidavit" that Mrs. Hansen's position on the boat was one of complete safety. In fact, Respondent fails to even elude to any such evidence, but suggests to this Court that "[t]he District Court had already made the determination, based on everything in the record at the time, that Mrs. Hansen was not in physical danger, as long as she did not attempt a rescue." [Res.Opp. at pg. 4].[3]

Petitioner was denied her constitutional right of due process as offered by the Fifth and Fourteenth Amendments to the United States Constitution, in that the District Court made judgments on material facts when such factual issues were not litigated or submitted to a jury. The issue of whether Petitioner was in the "zone of danger" was and remains in Utah to be a jury question. Petitioner was denied the right to submit the issues to a jury for determination.

The defendants made bare assertions that because the boat was made of fiberglass, and that Mrs. Hansen was positioned on the rear of the boat, that she in no manner could be threatened by an electrical shock. Again, the issue of being shocked by electricity and being threatened by it are not synonymous. The term "everything" used by the Respondent to signify an abundant record below is actually an empty void. Respondent has not referred to anything in the record, except the arguments of counsel as contained in the transcripts. Not one of the passages quoted by the Respondent resolve the question here. The Respondent's references to quoted

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[3] The record is devoid of any statement by the lower court that its ruling on the "threat" issue was based upon Mrs. Hansen's failed attempt to rescue.

portions of the transcripts is ample proof that there was nothing in front of the lower court to make such a determination on the issue of threat.[4]

The subject of this review concerns application of the standards, or lack of, and whether such standards contemplate remarks of counsel as constituting "evidence" upon which the court may properly base and decide upon issues of fact as being undisputed. The obvious defect in such an interpretation would permit the judge to weigh the arguments of counsel, make determinations from the inferences, and enter a judgment on the strength of suggestions and conjecture.

Simply stated, the unsworn statements and arguments of counsel do not constitute admissible evidence for purposes of summary judgment under Rule 56, Federal Rules of Civil Procedure. See Aramburu v. The Boeing Company, 112 F.3d 1398 (10th Cir. 1997); Panis v. Mission Hills Bank, 60 F.3d 1486 (10th Cir. 1995), cert. denied, 116 S.Ct. 1045 (1996) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

The straightforward facts in this case include (1) only defendants' oral arguments made at the summary judgment level carried the day and convinced the lower court to enter judgment; (2) the Certification Order is not dispositive of the issue here since the

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[4] Petitioner would point out that not all of the "evidence" was before the court, especially by reason of Respondent's counsel secretly having taken an electrical component off of the boat with the assistance of an expert witness, and concealing the component part in Respondent's counsel's desk drawer for some twenty-two (22) months without plaintiffs' knowledge. The lower court failed to see any adulteration or misconduct and passed on the subject over plaintiffs' objection. Summary Judgment was entered prior to the discovery of the missing evidence.

lower court had already made up its mind to grant summary judgment prior to certification; (3) statements of Plaintiff's counsel during oral argument are not admissions, especially when considered as "hindsight[5];" (4) Respondent points to no evidence, but simply indicates it exists; (5) the issue of fear was resolved in Petitioner's favor; and most important (6) a litigant has been subjected to gross abuse of the legal system, especially by reason of Respondent's counsel taking and concealing critical evidence in the case, which was not discovered until after summary judgment was entered.

If there is a shred of "evidence" as Respondent indicates to even suggest that the boat was safe and posed no threat of harm to the Petitioner, it would be a simple task to point it out. On the contrary, Respondent simply says the district court made a ruling based on "everything" before him, and, therefore, it must be correct. There is no evidence, but merely suggestions of counsel. The "evidence" Respondent refers to in its response here concerned only the issue of "fear" and not that of whether Petitioner was threatened.

Petitioner would point to one single piece of evidence that continues to escape scrutiny, as it did by the Appellate Court, that at least one other individual received an electrical shock on his arm while standing on the back of the boat, exactly where Mrs. Hansen was located. [Pet.App. C at 368: 6-22]. The defendants argument that Mrs. Hansen had no reason to be threatened by electricity is supposition, without any support other than suggestions of counsel. Defendants offered nothing in the form of affidavit or otherwise to support that bare contention.

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[5] The reference in Rule 56, F.R.C.P. concerning "admissions on file" cannot be construed to include statements of counsel made during oral argument.

The undisputed evidence at the time the motions were made was that the boat itself was the conduit through which the electricity flowed, including the engine and all components wired to it, directly or indirectly. Mrs. Hansen was within inches of the engine, and fortunately did not touch any part of it. Although she made no physical contact with energized components on the boat, just knowing they were energized created the "threat" of actual harm. Actual harm or direct contact is not required under Utah law, but merely the threat or possibility of harm. Johnson, supra.

The established standard under Rule 56, F.R.C.P. provides that *"[w]here different inferences can be drawn from conflicting affidavits, depositions and pleadings, summary judgment should not be granted."* United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). The Diebold decision holds that where there exists affidavits, depositions, and pleadings, which create different inferences, summary judgment should not lie. In this case, the different inferences were created from arguments of counsel ONLY. Those inferences were construed against Mrs. Hansen at every stage, even upon reconsideration. In this matter, inferences concerning the issue of threat were not raised from affidavits, depositions, or pleadings, but on an oral submission of counsel. Summary judgment should not have been granted on that basis alone.

The deposition statement of Mrs. Hansen and her affidavit went only to the issue of her "fear," and NOT the issue of whether she was threatened with harm. The issue of fear was resolved against the Respondent. The issue of threat had no support other than opinions of counsel. To that end, arguments of counsel supplanted the required showing of a moving party, and such matters were inferred as against the non-moving party.

C. PLAINTIFFS PREVAILED IN THE SECOND JURY TRIAL WHERE RESPONDENT ATTEMPTED, BUT FAILED, TO DISPROVE ITS LIABILITY.

Concerning Respondent's remarks that the Petitioner has had "her day in court" and even if this matter were remanded, she would have lost like all of the other personal injury plaintiffs. Despite continued arrogance and deceitful tactics of concealing evidence in his drawer, Respondent's counsel fails to realize that he lost at the second trial. Respondent elected to bring his chosen experts to trial, and this time the jury did not believe them. Judgment was entered in favor of the Plaintiffs, especially as to the issue of liability. See Pet.Supp.App. "H" pg. 44-46 hereto.

If Mrs. Hansen is allowed her day in court, since she has yet to have one, she will prevail on the issues against the Respondent as was done before.

CONCLUSION

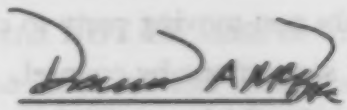
While arguments of counsel are a necessary evil in the judicial process, singular consideration of those arguments should not provide a basis for granting or denying a motion for summary judgment. In this case, a suggestion by counsel to support a motion for summary judgment should not be sufficient to switch the burden upon the non-moving party to come forward with evidence to refute verbal suggestions by counsel. To this late day, Respondent has yet to identify which part of the record it relies upon to show that the court, prior to certification, had any evidence to rule Mrs. Hansen was not threatened with bodily harm. There simply is none, and Respondent is afraid of that fact.

This Petition should be granted in order for the Court to address and rule upon the issue concerning the minimum evidentiary requirements necessary for a moving party under Rule 56, Federal Rules of Civil Procedure. More importantly, the Court should set forth its opinion whether arguments of counsel are sufficient to satisfy the movant's burden under Rule 56. If they are not, as has been faithfully contended by Respondent, then this matter must be addressed and resolved. Despite the simplistic nature of the issue presented on this Petition, no minimum standard has been addressed as it concerns application of Rule 56, F.R.C.P. standards to arguments of counsel.

There exists in this matter a serious question and potential for abuse of the minimum evidentiary requirements for a moving party under Rule 56 of the Federal Rules of Civil Procedure. Permitting supposition as a basis for granting summary judgment is violative of a litigants fundamental right of access to the courts and due process of law under the Fifth and Fourteenth Amendments of the United States Constitution. Adulterated submissions of counsel should be expunged from any proceeding wherein a litigant's fundamental rights to due process are potentially deprived.

The petition for a writ of certiorari should accordingly be granted.

DATED this 12th day of September, 1997.



DAVID A. McPHIE
Attorney for Petitioner

SUPPLEMENTAL APPENDIX

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH
June 5, 95
9:28 a.m.
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN and	:	
LINDA K. HANSEN,	:	
	:	
Plaintiffs,	:	SPECIAL VERDICT
	:	
v.	:	
	:	
SEA RAY BOATS, INC.,	:	
	:	
Defendant.	:	

MEMBERS OF THE JURY:

Please answer the following questions. If you find that the greater weight of the evident, by however slight a margin, is in favor of the issue presented, answer "yes." If you find the evidence is so equally balanced that you cannot determine which side is supported by the greater weight of the evidence, however, slight, or if you find that the evidence is slightly against the issue presented, you should answer "no."

1. Was the boat supplied by Sea Ray free from defects caused by faulty workmanship or materials?

Yes___ No__X__

If your answer is "yes," skip all other questions and sign and date the verdict. If your answer is "no," proceed to the next question.

2. Did Sea Ray repair defects caused by faulty workmanship or materials within a reasonable time and number of attempts?

Yes___ No__X__

If your answer is "yes," skip all other questions and sign and date the verdict. If your answer is "no," proceed to the next question.

3. Did Sea Ray warranty to repair defects caused by faulty workmanship or materials fail of its essential purpose?

Yes__X__ No___

If your answer is "no," skip all other questions and sign and date the verdict. If your answer is "yes," proceed to the next question.

4. Did the said defects caused by faulty workmanship or naterials substantially impair the value of the boat to the Hansens?

Yes__X__ No___

If your answer is "no," skip all other questions and sign and date the verdict. If your answer is "yes," proceed to the next question.

5. Did the Hansens reasonably refuse to accept the boat, or revoke their acceptance of the boat so as to be entitled to a return of the purchase price?

Yes X No____

If your answer is "no," skip all other questions and sign and date the verdict. If your answer is "yes," proceed to the next question.

6. The purchase price of the boat to the Hansens was $34,700.00. How much, if any, should be subtracted if the purchase price were to be refunded to the Hansens to make up for the Hansens' use and enjoyment of the boat?

$ 6,000.00

Proceed to the next question.

7. How much money should be awarded to the Hansens to reimburse them for their incidental and consequential damages?

$ 25,337.69

DATED: June 2, 1995.

s/ Bruce B. Adams
FOREPERSON